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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

NO. 73-1620

JOHN R. BROWN, SR., M.D., *Petitioner*

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT
ET AL, *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
The Fifth Circuit

BRIEF IN OPPOSITION

OF RESPONDENTS
CENTRAL EDUCATION AGENCY
STATE COMMISSIONER OF EDUCATION
STATE BOARD OF EDUCATION

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May 27, 1974

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Statutory Provisions	3
Argument	3
Conclusion	15
Certificate of Service	16
Appendix (Relevant Texas Statutes)	19

TABLE OF AUTHORITIES

CASES — Page

Abington School District v. Schempp, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963) 6

Barbier v. Connolly, 113 U.S. 27, 28 L.Ed. 923, 5 S.Ct. 357 (1884) 5

Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929) 5

Brusca v. Missouri, 332 F.Supp. 275 (E.D.Mo. 1971), aff'd., 405 U.S. 1050, 31 L.Ed.2d 786, 92 S.Ct. 1493 (1972) 4

Cornwell v. State Board of Education, 314 F.Supp. 340 (D.Md. 1969), aff'd., 428 F.2d 471 (4th Cir. 1970), cert.denied, 400 U.S. 942, 27 L.Ed.2d 246,91 S.Ct. 240 (1970) 4

Epperson v. Arkansas, 393 U.S. 97, 21 L.Ed.2d 228, 89 S.Ct. 266 (1968) 6, 7

Hourihan v. Dakin, (No. 73-1191), __U.S.__(1974), 42 U.S. Law Week 3576 11

Interstate Consolidated Street Railway Co. v. Massachusetts, 207 U.S. 79, 52 L.Ed. 111, 28 S.Ct. 26 (1907) 5

Jackson v. California, 460 F.2d 282 (9th Cir. 1972) 4

Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971) 6

TABLE OF AUTHORITIES (contd.)

McGowan v. Maryland, 366 U.S. 420,
6 L.Ed.2d 393, 81 S.Ct. 1101 (1961) 4, 5, 12

Meyer v. Nebraska, 262 U.S. 390,
67 L.Ed. 1042, 43 S.Ct. 625 (1923) 5

O'Hair v. Payne, 432 F.2d 66 (5th Cir. 1970),
cert. denied, 401 U.S. 955, 28 L.Ed.2d 238,
91 S.Ct. 974 (1971) 11

Pacific States Box & Basket Co. v. White,
296 U.S. 176, 80 L.Ed. 138,
56 S.Ct. 159 (1935) 12, 13, 14

Pauling v. McElroy, 278 F.2d 252 (D.C.Cir. 1960),
cert. denied, 364 U.S. 835, 5 L.Ed.2d 60,
81 S.Ct. 61 (1960) 10

Tilton v. Richardson, 403 U.S. 672,
29 L.Ed.2d 790, 91 S.Ct. 2091 (1971) 6

Wisconsin v. Yoder, 406 U.S. 205,
32 L.Ed.2d 15, 92 S.Ct. 1526 (1972) 8

CONSTITUTIONAL PROVISIONS

United States Constitution:

First Amendment 2, 3, 4, 5, 6, 7, 8, 9, 11
Fourteenth Amendment 5

FEDERAL RULES

Fed. R. Civ. P. 12(b)(6) 2

STATE STATUTES

TABLE OF AUTHORITIES (contd.)

Vernon's Texas Education Code,
§§12.11-12.16, 12.24, 12.62 ..... 3, 12, 19

TREATISE

16 Am. Jur. 2d, Constitutional Law
§306, p. 600 5

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OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix A) is reported at 366 F.Supp. 1208. The opinion

of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix D) is reported at 486 F.2d 137.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether in a First Amendment context petitioner's pleadings, concluding that "evolution" is a religious theory, present a claim upon which relief can be granted.

STATEMENT

The original Plaintiffs sought to enjoin the Houston Independent School District and the State Board of Education from teaching the "theory of evolution" as a part of the District's academic curriculum and from adopting textbooks which present the theory to the exclusion of the "creation theory" regarding the origins of man. Subsequently, Petitioner was permitted to intervene. The District Court, after notice and hearing, granted the District's Motion to Dismiss for Failure to State a Claim upon Which Relief Can be Granted made pursuant to Fed. R. Civ. P. 12(b)(6). The Court of Appeals for the Fifth Circuit in a Per Curiam Opinion affirmed the Opinion of the District Court.

STATUTORY PROVISIONS

Relevant provisions of Sections 12.11-12.16, 12.24, 12.62 of Vernon's Texas Education Code are reproduced in the Appendix at page 19.

ARGUMENT

The State of Texas is neutral with respect to competing religious or spiritual concepts, and it does not prefer non-religion over religion, religion over non-religion, or any particular religion over a different one. In that respect, this brief is neutral also. It does not assume that "creation" is wrong and "evolution" is right — or vice versa. It merely seeks to posit the law as it applies to the particular situation presented for decision, i.e., one where the State Board of Education has determined that the origin of man is a legitimate subject of secular inquiry and that the theory of evolution, as it respects the origin of the species, is a useful scientific hypothesis which should not be excluded from school textbooks.

There are no special reasons for a review by the Supreme Court, and the results reached by the Courts below were correct. The State of Texas need not tailor its curricula or textbooks to avoid subjects of study because they are controversial in the eyes of some.

Though Petitioner couches his arguments in terms of the Establishment Clause and the Free Exercise Clause

of the First Amendment to the U.S. Constitution, his real complaint is one of "arbitrary classification." The focal points of his arguments are: (1) the origin of man is not really a scientific subject, but rather a religious one; and (2) though the subject ought not to be taught at all in the schools, if it is taught, competing religious explanations for man's origin should be given "equal time" in the classroom.

Petitioner's argument rests upon the supposition that "the theory of evolution" is a basic tenet of atheistic theological thought, and that, though it may have been originally dubbed "scientific," it has been so widely adopted by non-believers as to become inseparable from such non-belief. [See *Jackson v. California,* 460 F.2d 282, 283, note 1 (9th Cir. 1972), where similar claims were unsuccessfully urged.]

The lower Court was asked to declare, in effect, that the theological adaptation of a scientific proposal *ipso facto* disqualifies the proposal as a scientific one. Cf. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961); *Cornwell v. State Board of Education,* 314 F.Supp. 340 (D.Md. 1969), aff'd, 428 F.2d 471 (4th Cir. 1970), cert. denied, 400 U.S. 924, 27 L.Ed.2d 246, 91 S.Ct. 240 (1970); *Brusca v. Missouri,* 332 F.Supp. 275 (E.D.Mo. 1971), aff'd, 405 U.S. 1050, 31 L.Ed.2d 786, 92 S.Ct. 1493 (1972).

State laws regulating the education of the young, promulgating a curriculum, and providing text books

are exercises of the police power. *Barbier v. Connolly,* 113 U.S. 27, 28 L.Ed. 923, 5 S.Ct. 357 (1884); *Interstate Consolidated Street Railway Co. v. Massachusetts,* 207 U.S. 79, 52 L.Ed. 111, 28 S.Ct. 26 (1907); *Borden v. Louisiana State Board of Education,* 168 La. 1005, 123 So. 655, 661 (1929), 67 A.L.R. 1183, 1192; 16 Am.Jur.2d, Constitutional Law §306, p. 600.

One of the rights protected by the Fourteenth Amendment is the right of the individual "to acquire useful knowledge" and the state cannot interfere with that right by arbitrary action, even though the interference be in the guise of protecting the public interest. A state may not arbitrarily forbid the teaching of any subject. *Meyer v. Nebraska,* 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923). The Petitioner seeks to enjoin the teaching of the theory of evolution to anyone in public schools because it conflicts with his religious belief and, he says, constitutes a tenet of another (anti) religion. He says the state, in order to maintain neutrality, must either stop teaching evolution as a viable explanation for the origin of the species, or accord his alternative explanation an equal position in the curriculum.

The Establishment Clause, however, does not ban federal or state regulation, the reason or effect of which happens to coincide or harmonize with the tenets of some or all religions. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961). If the purpose of teaching evolution is secular and if the primary effect

thereof is to neither advance nor hinder religion, and if it does not foster church/state entanglements, it is wholly immaterial that the concept is more compatible with some other religious view than with that held by the Petitioner. Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971); *Tilton v. Richardson*, 403 U.S. 672, 29 L.Ed.2d 790, 91 S.Ct. 2091 (1971); *Abington School District v. Schempp*, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963).

The neutrality required by the First Amendment does not require the state to refuse to its citizens the right to acquire useful knowledge, nor to surrender to religious or anti-religious advocates the power to determine for others whether some purported body of knowledge is useful or not useful. As said in *Epperson v. Arkansas*, 393 U.S. 97, 21 L.Ed.2d 228, 89 S.Ct. 266 (1968), where the Arkansas anti-evolution law was under consideration:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. 393 U.S. at 104
>
> * * * *
>
> There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. 393 U.S. at 106

In *Epperson v. Arkansas,* Justice Fortas referred to the theory of evolution as "a scientific theory or doctrine," observing that the state's "undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment." 393 U.S. at 107. The opinion had already noticed that the state has no legitimate interest in protecting any or all religions from views that are distasteful to them.

Whenever the Courts have intervened in school textbook and curricula affairs, it has been to eliminate restrictions upon the free advance of knowledge — not to force the inclusion of any particular theory as "better" or "right", or even "equal".

The Petitioner here is no more entitled to have the Courts force into the textbooks the "instantaneous creation" theory, (even if considered a purely secular hypothesis) than would other parents be entitled to insist that "old math" be taught right alongside the baffling (to a student from a former era) "new math" now being taught in most schools. "Old math" may be more sound in principle and logic than "new math", but so long as the state does not repress any particular theory or body of knowledge, its school authorities are (and must be) free to select those secular subjects for study which advancement of the learning process suggests to them.

While unwanted exposure of the Petitioner to unshared views, if coerced, might amount to a violation of the Free Exercise Clause under some circumstances, the remedy is exemption. *Wisconsin v. Yoder,* 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972). The Petitioner here has not pleaded any refusal by school authorities to accord his children exempt status — and indeed, he does not want it. He neither asked for an exemption nor pleaded facts (as opposed to possibilities) demonstrating the effect of the school curriculum on their religious beliefs. He instead seeks to prevent the exposure of anyone in school to ideas regarding the origin of man unless his own concept about the matter is formally presented also. It is as though the Amish in *Yoder* had insisted that the school system in Wisconsin either include Amish attitudes in its teaching program, or shut the schools down.

The matter of classification confounds such arguments. If the "creation theory" is secular, then it must compete for a place in the curriculum on its own merits, unaided by any *positive* impetus from the First Amendment. The state's only obligation is to permit a free flow of ideas. If the "creation" theory is religious, and not secular, then it may not be foisted upon the public schools, whether or not it is accompanied by a second or different religious explanation, because the state cannot prefer one religion over another, or two religions over the rest.

Under no circumstances then, may the Petitioner lawfully succeed in *forcing* the schools to teach "creation". The only alternate relief he seeks is to outlaw all discussions in the schools regarding the origin of man, especially in an "evolution" context. To succeed, he must establish that explanations regarding the origin of man, and particularly the "evolution" explanation, involve purely religious matters and are not properly classified as legitimate secular fields of inquiry, i.e., that the State of Texas is arbitrary and capricious in considering them so.

If "evolution" *is* purely a religious viewpoint or doctrine, then neither the "creation" theory (assuming it is considered a religious doctrine also) nor the "evolution" theory could be taught, because the Establishment Clause would be contravened. But if the "religious" character of the "evolution" theory is not so clear as to show arbitrariness or caprice in classifying it otherwise, the Petitioner cannot win or secure any relief under any circumstances.

Point "eight" of Intervening Plaintiffs' First Amended Original Petition is the only portion of Petitioner's pleadings directed to the central question: "Is 'the theory of evolution' a religious doctrine?", and it merely states:

> That said theory of evolution is a central doctrine in atheistic philosophy, atheistic religious thought or form or forms of religion and as such has become itself a sectarian doctrine * * * [the State is] in the

> position of teaching such sectarian doctrine to the total exclusion of all other alternatives, *which said alternatives are classified by the state as sectarian doctrines.* R. 69, 71, 72 (Emphasis added)

On motions to dismiss, all well-pleaded facts are to be taken as true, but the truth of legal conclusions cast in the form of fact statements is not thereby admitted.

In *Pauling v. McElroy,* 278 F.2d 252 (D.C.Cir. 1960), cert. denied, 364 U.S. 835, 5 L.Ed.2d 60, 81 S.Ct. 61 (1960), a group of individuals sued to stop government nuclear testing. The District Court dismissed the suit for failure to state a claim involving a justiciable controversy and for lack of standing to sue. The Plaintiffs there alleged that nuclear tests "will cause world-wide fallout of radioactive debris * * * and will increase the radioactive strontium content of the soil and the amount of contamination of the food supply of the world and of the bones of human beings." They also alleged that radioactive debris would be "eventually deposited on the surface of the earth * * * [and thereby] contribute to the exposure of human beings to radiation."

The Court said:

> While the appellees' motions for dismissal admit, for purposes of the motion, all well pleaded facts in the complaints, such admission does not, of course, embrace sweeping legal conclusions cast in the form of factual allegations. 278 F.2d at 253.

The Court in *Pauling v. McElroy* went on to uphold the dismissal on "no standing" grounds. Its holding

regarding the effect of broad conclusory allegations was followed by *O'Hair v. Payne*, 432 F.2d 66 (5th Cir. 1970), cert. denied, 401 U.S. 955, 28 L.Ed.2d 238, 91 S.Ct. 974 (1971), in a First Amendment context. Mrs. O'Hair sought to enjoin NASA from authorizing astronauts to participate in religious activities during space flights. The Fifth Circuit Court of Appeals affirmed a lower court's dismissal of the case for failure to state a claim upon which relief could be granted.

And on April 15 of this year, it appears (from the report at 42 U.S. Law Week 3576) that the Supreme Court denied certiorari in No. 73-1191 on its docket (*Hourihan v. Dakin*), thereby leaving undisturbed a First Circuit Court of Appeals decision that allegations of religious discrimination consisting of "but the most conclusory of charges" are insufficient to state a cause of action upon which relief can be granted.

Except for "the most conclusory of charges" that the theory of evolution "is a central doctrine in * * * atheistic religious thought or form or forms of religion and as such has become itself a sectarian doctrine", the Petitioner does not make any allegations in his pleadings tending to show that the theory of evolution is in fact a religious doctrine rather than a secular one. The use of the phrase "has *become* * * * a sectarian doctrine" in the above statement seemingly admits that the thory of evolution as it respects the origin of man was not originally a sectarian matter, but the result of scientific inquiry.

It is not enough for the Petitioner to show that the "creation theory" might also be considered a secular explanation.

In administratively adopting textbooks classifying the theory of evolution as a secular (rather than sectarian) doctrine, the Texas State Board of Education acted under a power legally delegated to it by the Texas Legislature. Texas Education Code, §§12.11-12.16, 12.24, 12.62. When legislative action, within the scope of the police power, or administrative action pursuant to a legislative delegation of such power, is called into question, there is a presumption of the existence of a state of facts that would sustain it if any such state of facts can reasonably be conceived, *McGowan v. Maryland*, 366 U.S. 420, 6. L.Ed.2d 393, 81 S.Ct. 1101 (1961); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 80 L.Ed. 138, 56 S.Ct. 159 (1935).

In *Pacific States Box & Basket Co. v. White, supra*, the maker of a certain kind of container sought to enjoin the State of Oregon from legally specifying that only a different kind of container was suitable for the storage of raspberries. The Plaintiff alleged the administrative action specifying the other type container, alone, to be suitable for use as a container for such berries (thereby excluding the Plaintiff's type) was arbitrary and capricious. The Plaintiff claimed that its type container was just as suitable as the other, and perhaps more so.

The claim which the Plaintiff made in that case is analogous to the one made here, in that the Petitioner here claims that his theory of the origin of man is just as valid and just as scientifically supportable as the theory of evolution, and that the state is incorrect in classifying the evolution theory as a scientific one, especially while denying that classification to the theory espoused by the Petitioner.

In *Pacific States Box & Basket Co.*, the Supreme Court affirmed a District Court's dismissal of the complaint for failure to state a claim upon which relief could be granted, saying:

> '[O]ne who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary' * * * The burden is not sustained by making allegations which are merely the general conclusions of law or fact * * * Facts relied upon to rebut the presumption of constitutionality must be specifically set forth * * * A motion to dismiss, like a demurrer, admits only facts well pleaded. 296 U.S. at 185.

The Petitioner here wholly failed to plead any facts tending to show that the State Board of Education classification of the theory of evolution as a scientific theory is so unreasonable and devoid of a temporal, rational basis as to be arbitrary and capricious. Moreover, he has wholly failed to plead facts showing that the alleged "sectarian" classification of his explanation of the

origin of man is arbitrary or capricious. Only broad and unsupported conclusions suggest any such claims. Such sweeping allegations cannot forestall a dismissal. As the Supreme Court noted in the *Pacific States Box & Basket Co.* case, the wisdom of the administrative action is not for the Courts to decide; they may inquire only whether it is arbitrary or capricious.

Because the Plaintiffs totally failed to plead any facts showing arbitrariness or caprice by the state and local school authorities in the classification of the theory of evolution as a secular subject of study, the District Court Judge was imminently right in dismissing the action for failure to state a claim upon which relief could be granted, and there is no reason to grant writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit which affirmed that decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three true and correct copies of the foregoing Brief in Opposition of Respondents Central Education Agency, State Commissioner of Education, and State Board of Education to Petition for Writ of Certiorari have been served on Herbert L. Coffman, attorney for Petitioner John R. Brown, Sr., M.D., by mailing copies of same by United States mail with sufficient postage thereon to Herbert L. Coffman, 5757 Bellaire Blvd., Suite 203, Houston, Texas 77036, and on the Houston Independent School District by mailing copies of same by United States mail with sufficient postage thereon to William Key Wilde, Bracewell & Patterson, 1808 First City National Bank Building, Houston, Texas 77002.

LARRY F. YORK

APPENDIX

APPENDIX

Vernon's Texas Education Code:

§12.11. State Textbook Committee

(a) The commissioner of education . . . shall recommend the names of 15 persons, no two of whom shall live in the same congressional district, for appointment to the textbook committee for a one-year term.

(b) Each of the persons so named shall be an experienced and active educator engaged in teaching in the public schools of Texas . . .

* * *

(e) It shall be the duty of the textbook committee to recommend to the commissioner of education a complete list of textbooks which it approves for adoption at the various grade levels and in the various school subjects . . .

* * *

§12.12. Recommendations by State Commissioner of Education

(a) The commissioner of education may remove books from the list recommended by the State Textbook

Committee, but shall not place on the list any book not recommended by the committee, nor shall he reduce to a single adoption any list for a specific grade or subject in which multiple adoption is recommended by the committee.

(b) The commissioner of education, pursuant to the provisions in Subsection (a) of this section, shall submit to the State Board of Education the list recommended by the State Textbook Committee.

§12.13. Adoption by State Board of Education

The State Board of Education may remove books from the list submitted by the commissioner of education, but the board shall not place on the list any book not recommended by the commissioner of education, nor shall the board reduce to a single adoption any list for a specific grade or subject in which multiple adoption is recommended by the commissioner of education.

§12.14. Multiple List for Elementary Grades

(a) The State Board of Education shall select and adopt a multiple list of textbooks for use in the elementary grades of the public schools of Texas.

(b) The multiple list shall consist of not less than three nor more than five textbooks on the following subjects: spelling, reading (basal and supplementary),

English language and grammar, geography, arithmetic, physiology-hygiene, civil government, driver education and safety, vocal music, elementary science, history of the United States (in which the Confederacy shall be fairly represented), history of Texas, agriculture, a system of writing books, and a system of drawing books.

(c) The board may also select and adopt textbooks for any additional subjects approved by the State Department of Education for teaching in the elementary schools, including but not limited to the foreign languages of German, Bohemian, Spanish, French, Latin, or Greek.

(d) The board may, if deemed necessary, adopt as textbooks a geography of Texas and a civil government of Texas.

(e) No book adopted shall contain anything of a partisan or sectarian character.

§12.15. Multiple List for High Schools

(a) The State Board of Education shall adopt a multiple list of books for use in the high schools of Texas.

(b) The multiple list shall include not fewer than three nor more than five textbooks on the following subjects: algebra, plane geometry, solid geometry, general science, biology, physics, chemistry, a one-year

world history, American history, homemaking, physical geography, driver education and safety, vocal music, English composition, literature (including American literature and English literature), shop courses, physiology, agriculture, civil government, commercial arithmetic, bookkeeping, typewriting, shorthand, journalism, and the Latin, Spanish, German, Czech and French languages.

(c) Free textbooks may also be adopted and provided for any additional courses or subjects approved by the Central Education Agency and accredited by the state accrediting committee.

§12.16. Other Provisions

* * * *

(c) Textbooks adopted in accordance with the provisions of this section are adoptions for every public school in this state and no public school in the state shall use any textbook unless it has previously been approved and adopted by the State Board of Education. The board shall prescribe rules under which such textbooks adopted and approved shall be introduced or used by or in the public schools of the state.

* * * *

§12.24. *Selection and Adoption*

(a) The State Board of Education shall make a full and complete investigation of all books and accompanying bids. The textbooks shall be selected and adopted after a careful examination and consideration of all books presented.

(b) The books selected and adopted shall be those which in the opinion of the board are most acceptable for use in the schools. Quality, mechanical construction, paper, print, price, authorship, literary merit, and other relevant matters shall be given such weight in making the decisions as the board may deem advisable.

* * * *

§12.62. *Local Adoptions*

(a) No public school in the state shall use any textbook unless it has been previously adopted and approved by the State Board of Education.

(b) In each subject of the elementary and high school grades, one or more of the several textbooks of each multiple list adopted may be selected by local school officials; . . .

* * * *